

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

JANUARY TERM, 1913.

No. 2523.

2

FRANK X. O'BRIEN, APPELLANT,

vs.

WALTER L. FISHER, SECRETARY OF THE INTERIOR,

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED FEBRUARY 26, 1913.

PRINTED FEBRUARY 28, 1913.

Court of Appeals of the District of Columbia.

JANUARY TERM, 1913.

No. 2523.

FRANK X. O'BRIEN, APPELLANT,

vs.

WALTER L. FISHER, SECRETARY OF THE INTERIOR,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 2523.

FRANK X. O'BRIEN, Appellant,
vs.
WALTER L. FISHER, Secretary, &c.

a Supreme Court of the District of Columbia.

In Equity. No. 31481.

FRANK X. O'BRIEN, Plaintiff,
vs.
WALTER L. FISHER, Secretary of the Interior, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1

Bill for Injunction.

Filed December 13, 1912.

In the Supreme Court of the District of Columbia.

In Equity. 31481.

FRANK X. O'BRIEN, Plaintiff,
vs.
WALTER L. FISHER, Secretary of the Interior, Defendant.

Now comes the plaintiff and for a cause of action respectfully represents

1. That he is a citizen of the United States.
2. That the Defendant, Walter L. Fisher, is a citizen of the United States and holds office as Secretary of the Interior of the United States and is sued as such.

3. That the homestead law of May 20, 1862, (Section 2289 Revised Statutes) provides, among other things, that

"Every person who is the head of a family or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands, upon which such person may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at one dollar and twenty-five cents per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres."

2 4. That the records of the Department of the Interior show as a fact that under and by virtue of said Act of May 20, 1862, one William H. Baty, made original homestead entry #1602, Iron-ton, Missouri, on the 11th day of September, 1868, for land described as the W/2 of the NW/4 of Section 14, Township 23 North, Range 9 West, containing eighty acres.

4½. That said entry was made under that portion of said Act of May 20, 1862, which reads as follows:—

"And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres."

5. That the records of the Department of the Interior show that the said William H. Baty entered the aforesaid eighty acres of land at Iron-ton, Missouri, under the rules, regulations, practice and decisions of the Interior Department relating to the said Act of May 20, 1862.

6. That said William H. Baty made no other or further entry of public land under said Act or any other Act of Congress.

7. That the records of the Interior Department show as a fact that said William H. Baty made application and affidavit as required by Section 2290 of the Revised Statutes of the United States, and paid a fee of only \$5.00 as required upon homestead entries of eighty acres or less under said section which reads as follows:

3 SEC. 2290. "The person applying for the benefit of the preceding section shall, upon application to the register of the land-office in which he is about to make such entry, make affidavit before the register or receiver that he is the head of a family, or is twenty-one years or more of age, or has performed service in the Army or Navy of the United States, and that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and upon filing such affidavit with the register or receiver, on payment of

five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he shall thereupon be permitted to enter the amount of land specified."

8. That the records of the Department of the Interior show as a fact that at the time said William H. Baty made said homestead entry described in paragraph 4 of this bill, he owned and resided upon eighty acres of land contiguous thereto, which he had not acquired from the Government of the United States, but which eighty acres of land so owned and resided upon had been acquired by other parties from the United States in due course of law.

9. That Sections 2304 and 2306 of the Revised Statutes provide as follows:

SEC. 2304. "Every private soldier and officer who has served in the Army of the United States during the recent rebellion for ninety days, and who was honorably discharged and has remained loyal to the Government, * * * shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres, or one quarter section, * * *."

SEC. 2306. "Every person entitled, under the provisions of Section twenty-three hundred and four to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as when added to the quantity previously entered shall not exceed one hundred and sixty acres."

4 10. That under and by virtue of said Section 2306 of the Revised Statutes, and under the rules, regulations, decisions and practice of the Department of the Interior, the aforesaid homestead entry of said William H. Baty described in paragraph 4 of this bill, became a good basis for an additional right of entry of eighty acres.

11. That the records of the War Department as certified to the Interior Department show as a fact that said William H. Baty served in the Army of the United States in Battery "F," 1st Regiment, Missouri Light Artillery Volunteers, from May 17, 1864, to July 20, 1865, and was honorably discharged therefrom.

12. That the additional right of entry granted under said Section 2306 of the Revised Statutes and to which said William H. Baty was entitled, by reason of his said homestead entry described in paragraph 4 of this bill, and his military service described in paragraph 11 of this bill, was personal property subject to barter and sale, and your petitioner duly became the owner thereof by purchase and assignment in proper form.

13. That the plaintiff, on the 23rd day of August, 1911, in conformity with law and with the rules, regulations, decisions and practice of the Department of the Interior made due application (under the provisions of Section 2306 of the Revised Statutes of the United States), as owner of said additional right granted said William H. Baty, to enter Lot 40, Section 7, Township 7 North, Range 4 West, G. & S. R. Mer., Phoenix, Arizona, land district.

5 14. That the purchase of the Baty additional right and the said application made at Phoenix, Arizona, as aforesaid, were made by petitioner at a time when, the Department was holding that such an original homestead entry as that made by said William H. Baty at Ironton, Missouri, as aforesaid, was a good basis for an additional homestead right under the law and the rules, regulations, practice and decisions of the said Department.

15. That the application of plaintiff at Phoenix, Arizona, as aforesaid, was made to the Register and Receiver of the United States Land Office in that city, Phoenix, Arizona, on the 23rd day of August, 1911, and was thereafter continuously pending before the Department of the Interior and diligently prosecuted by plaintiff under a bona fide presentation of his claim, up to and inclusive of the dates of August 1, 1912 and November 7, 1912, hereinafter referred to, and is still pending before said Department at this time and has not been finally rejected.

16. That the Commissioner of the General Land Office on August 1, 1912, held for rejection the application of plaintiff, to enter the aforesaid lands at Phoenix, Arizona, contrary to the law, and to the decisions, rules, practice and regulations of the Interior Department, holding that said entry of William H. Baty, made under the Act of Congress of May 20, 1862, aforesaid, for eighty acres at Ironton, Missouri, as aforesaid, was a homestead entry of 160 acres instead of eighty acres because said Baty owned and resided upon eighty acres of contiguous land as aforesaid.

6 17. That thereupon and thereafter plaintiff appealed to the Secretary of the Interior, who, on November 7, 1912, affirmed the action of the Commissioner of the General Land Office, on the same grounds.

18. That the defendant in his said decision of November 7, 1912, threatens to finally reject plaintiff's application, holding that said William H. Baty made homestead entry for 160 acres, instead of for eighty acres as shown by the records of the Interior Department as aforesaid.

19. That your petitioner purchased the assignments of the said additional homestead right of William H. Baty, as aforesaid, under, pursuant to, and in full reliance upon the law and the departmental decisions, rules, regulations and practice in force and effect prior to and at the date of the making of his application to enter the lands at Phoenix, Arizona, as aforesaid.

20. That the enforcement of said decision will prevent the plaintiff from acquiring title to the land applied for as aforesaid and cause him to suffer great and irreparable loss and damage by reason thereof.

21. That enforcement of said decision will have the effect of condemning in petitioner's hands as worthless the property which he has purchased in good faith, under, and in accordance with, and in pursuance of the law and the rules, regulations, practice and decisions of the Interior Department, as aforesaid, which were in force at the time of said purchase and the making of said application at Phoenix, Arizona, as aforesaid.

7 22. That the action threatened by the defendant in his said decision of November 7, 1912, as aforesaid, is without authority of law, arbitrary, capricious, without regard to the rights of petitioner, and in violation of the rules, regulations, practice and decisions of the Interior Department in force at the date of plaintiff's purchase and application as aforesaid.

23. That the enforcement of said decision of November 7, 1912, supra, will deprive petitioner of his said property, without due process of law.

24. That the action of the defendant threatened in his said decision of November 7, 1912, is ultra vires and beyond the scope of the power, jurisdiction and authority of the Secretary of the Interior.

25. That your petitioner is without a full, complete and adequate remedy at law against the action threatened by the defendant in his said decision of November 7, 1912.

Wherefore your petitioner prays:

Prayers.

First. That a writ of subpoena be issued, directed to Walter L. Fisher, Secretary of the Interior, requiring him to appear and answer plaintiff's bill and each and every allegation contained therein, and to show cause why plaintiff should not have the relief prayed for.

8 Second. That he be enjoined from refusing to recognize and give force and effect to the records of the Interior Department showing William H. Baty to have made original homestead entry #1602 at Iron-ton, Missouri, on the 11th day of September, 1868, for land described as the W/2 of the NW/4 of Section 14, Township 23 North, Range 9 West, containing eighty acres.

Third. That defendant be permanently enjoined from rejecting plaintiff's application at Phoenix, Arizona, as aforesaid, under Section 2306 of the Revised Statutes of the United States, on the ground that defendant is not legally bound to recognize the law and give legal force and effect to the records, regulations, practice and decisions of the Interior Department in force at the time of the filing of plaintiff's application on August 23, 1911.

Fourth. That defendant be permanently enjoined from rejecting plaintiff's application at Phoenix, Arizona, as aforesaid, under Section 2306 of the Revised Statutes of the United States, on the ground that he has legal authority to add the lands owned by William H. Baty at the date of making his homestead entry aforesaid, to the eighty acres of land entered at Iron-ton, Missouri, by said Baty as aforesaid, under the Act of Congress approved May 20, 1862, as aforesaid, and that said entry was made for 160 acres instead of eighty acres as shown by the record.

Fifth. That it may please the court to give such other and further relief as the nature of this case may require.

FRANK X. O'BRIEN,
By F. W. McREYNOLDS,
D. N. CLARK,
Attorneys for Plaintiff.

6 FRANK X. O'BRIEN VS. WALTER L. FISHER, SEC'Y, ETC.

9 DISTRICT OF COLUMBIA, ss:

I, D. N. Clark do solemnly swear that I have read the annexed bill by me subscribed and know the contents thereof; that all statements of fact contained therein are upon personal knowledge of an examination of the records of the Department of the Interior, and are true, and those made upon information and belief I believe to be true.

D. N. CLARK.

Subscribed and sworn to before me this 13th day of December, 1912.

[SEAL.]

M. J. GRIFFITH,
Notary Public, D. C.

Demurrer.

Filed January 3, 1913.

* * * * *

The defendant says that plaintiff's bill is bad in substance.

CHARLES W. COBB,
Assistant Attorney General;
F. W. CLEMENTS,
First Assistant Attorney;
C. EDWARD WRIGHT,
Assistant Attorney,
For the Defendant.

Among matters of law to be argued are:

10 That it appears on the face of the bill that the matters thereby sought to be controlled are such as by Congress are committed wholly and exclusively to the jurisdiction of the defendant;

That the exercise of that jurisdiction in and over the matters set forth in said bill involves the exercise of judgment and discretion and is not purely ministerial in its nature;

That it appears on the face of the bill that in the exercise of that jurisdiction as aforesaid and at the instance of the plaintiff therein, the defendant, in due and regular course, according — due process of law, considered and determined the merits of plaintiff's case as set forth in his bill, and decided that plaintiff's application to enter public land of the United States must be rejected; and that by said bill plaintiff is seeking to secure the review of the defendant's decision by this court, notwithstanding the exclusive and final nature of defendant's jurisdiction, and that no appeal to a judicial tribunal is provided or authorized by law;

That the effect of granting plaintiff's prayers for relief would be the substitution of the court's judgment for that of the defendant in a matter exclusively within the defendant's jurisdiction;

And that the plaintiff has not in and by said bill made or stated a case as does or ought to entitle him to any relief such as is thereby sought and prayed for from or against the defendant.

11

Decree Dismissing Bill.

Filed February 12, 1913.

* * * * *

This cause coming on to be heard on the defendant's demurrer to the plaintiff's bill of complaint and having been argued by court, upon consideration thereof by the court it is, this 12 day of February, 1913,

Ordered, adjudged, and decreed that the demurrer be, and the same is hereby, sustained, and that the bill be, and the same is hereby, dismissed, and that the defendant may have his reasonable costs to be taxed by the Clerk against the plaintiff.

By the Court:

THOS. H. ANDERSON, *Justice.*

And an appeal from said decree having been noted in open court by the said plaintiff, said appeal is hereby allowed, and the penalty of the appeal bond is fixed at One hundred Dollars, or in lieu thereof, plaintiff may deposit Fifty dollars with the Clerk of the Court.

By the Court:

THOS. H. ANDERSON, *Justice.**Memorandum.*

February 20, 1913.—\$50 deposited in lieu of Appeal Bond.

12

Assignment of Errors.

Filed February 20, 1913.

* * * * *

1. The Court erred in sustaining the demurrer of defendant to the bill.

2. The Court erred in holding that it did not have jurisdiction to consider the question raised.

3. The Court erred in not holding that the construction sought to be put upon Sections 2289 and 2306 of the Revised Statutes could only be done by altering, amending or super-adding to said statutes.

4. The Court erred in not granting the writ of injunction as prayed for.

F. W. McREYNOLDS,
D. N. CLARK,
Attorneys for Plaintiff.

Designation of Record.

Filed February 20, 1913.

* * * * *

The Clerk will please make up the record for the appeal in this case.

F. W. McREYNOLDS,
D. N. CLARK,
Attorneys for Plaintiff.

13 The record to consist:—
Bill, as amended by stipulation; demurrer; decree; and assignment of errors.

O. K.:

CHARLES W. COBB,
F. W. CLEMENTS,
C. EDW. WRIGHT,
Attorneys for Defendant.

14 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

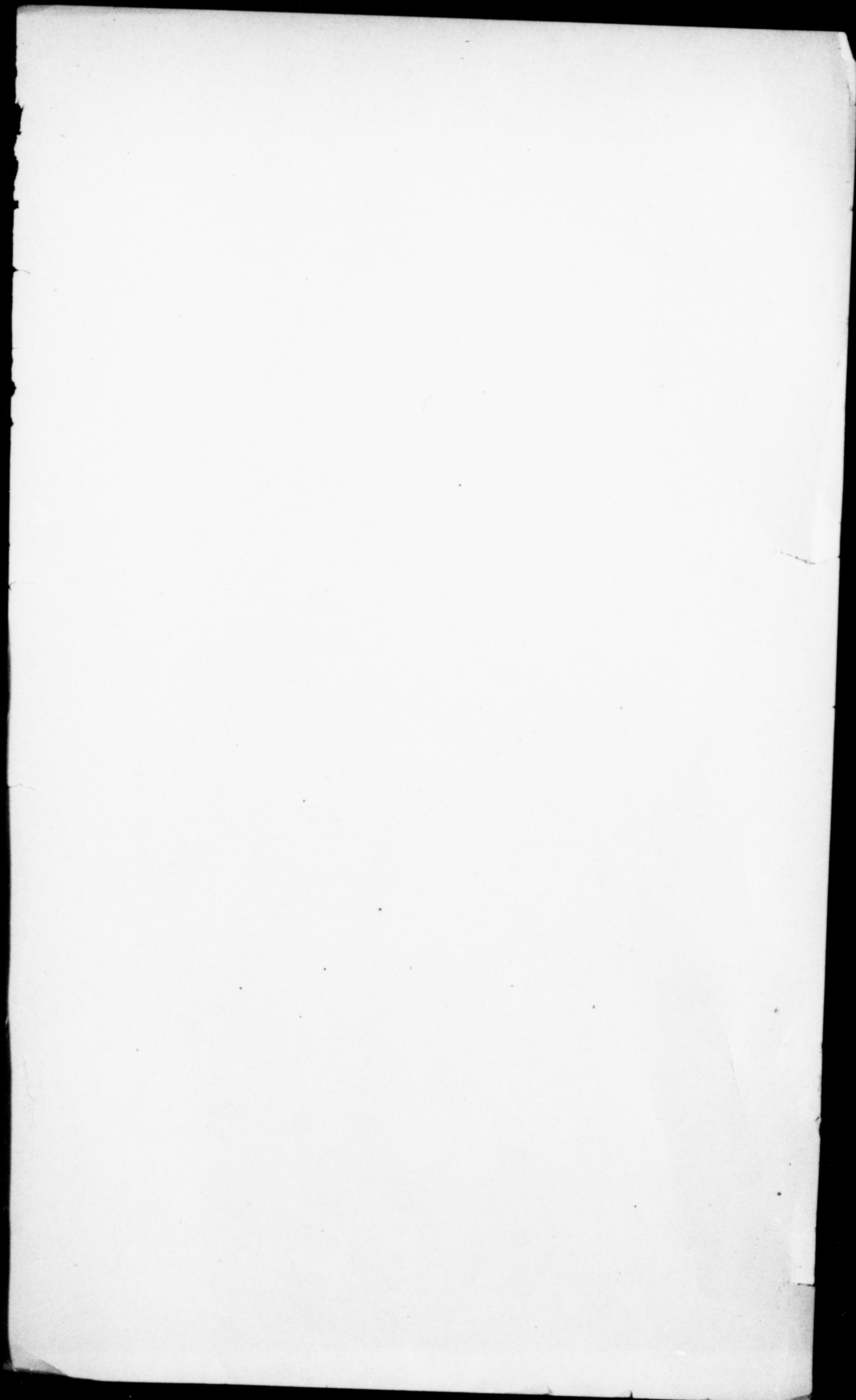
I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 13, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 31481 In Equity, wherein Frank X. O'Brien is Plaintiff and Walter L. Fisher, Secretary of the Interior, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 21st day of February, 1913.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2523. Frank X. O'Brien, appellant, vs. Walter L. Fisher, Secretary, &c. Court of Appeals, District of Columbia. Filed Feb. 26, 1913. Henry W. Hodges, clerk.



COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

MAR-28-1913

Frank X. O'Brien
U. S. 1246

IN THE

Court of Appeals, District of Columbia

No. 2523.

FRANK X. O'BRIEN, *Appellant,*

vs.

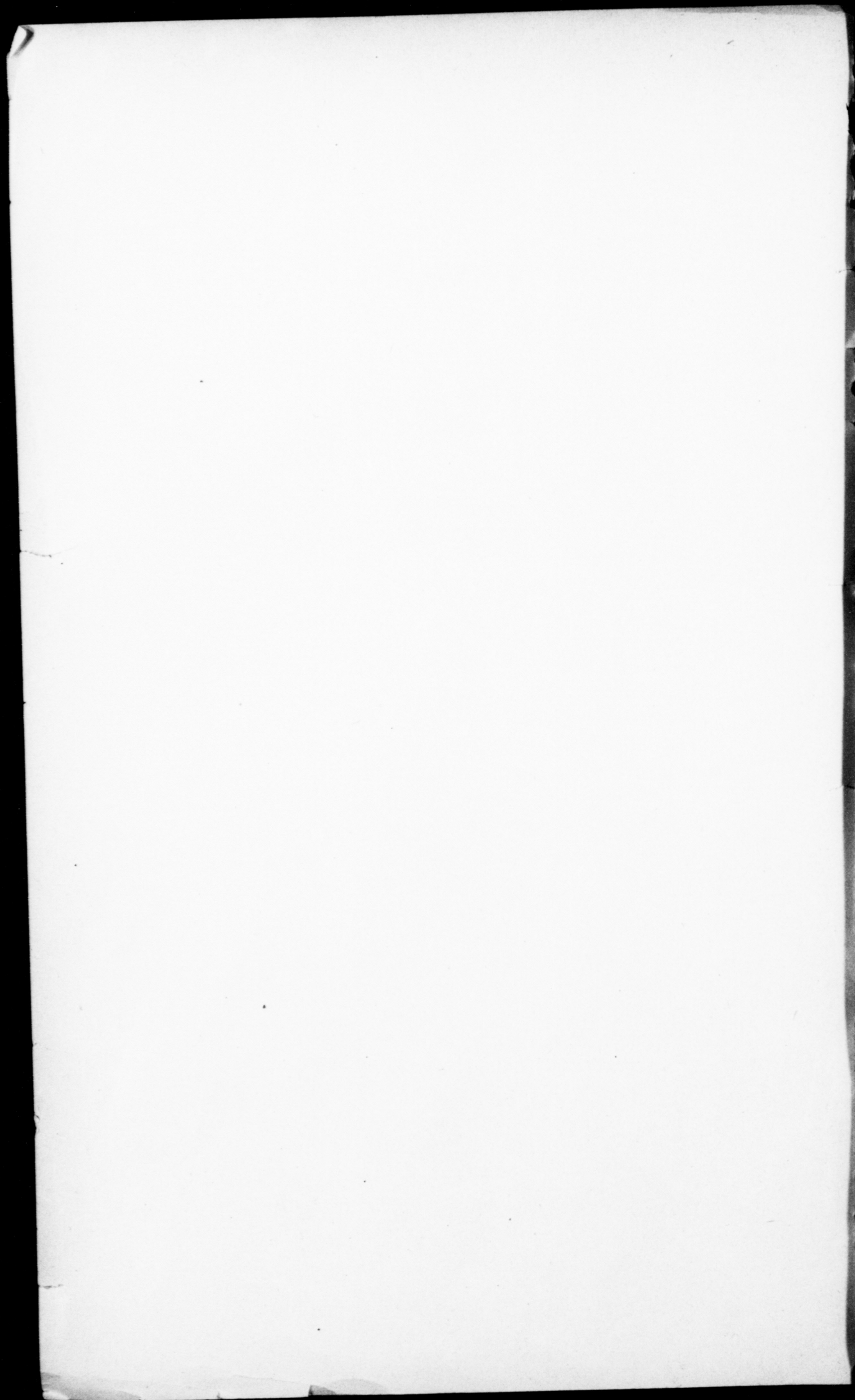
FRANKLIN K. LANE, *Secretary of the Interior, Appellee.*

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

BRIEF FOR APPELLANT.

F. W. McREYNOLDS,
D. N. CLARK,
Attorneys for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



IN THE
Court of Appeals, District of Columbia

No. 2523.

FRANK X. O'BRIEN, *Appellant*,

vs.

FRANKLIN K. LANE, *Secretary of the Interior, Appellee.*

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

BRIEF FOR APPELLANT.

STATEMENT.

This case comes before this court upon appeal from a decision by the lower court sustaining the demurrer of the Secretary of the Interior to O'Brien's bill for injunction.

The admitted facts, all of which are shown by the records of the Interior Department, are that one Wm. H. Baty, on the 11th day of September, 1868, made a homestead

entry of 80 acres under the Act of May 20, 1862 (now Section 2289 of the Revised Statutes), and the rules, regulations, practice and decisions of the Interior Department relating thereto; and paid the fee of \$5.00 as required by Section 2290 of the Revised Statutes for an entry of 80 acres or less (see par. 4, 5 and 7, page 2 of record); and that when he entered said 80-acre homestead, he owned and resided upon 80 acres of land contiguous thereto which had been lawfully acquired by other parties from the United States. (See par. 8, page 3 of record.)

That the Secretary of the Interior, on November 7, 1912, held for rejection the application of plaintiff, as assignee of said Baty, to make an additional entry under Section 2306 of the Revised Statutes, *solely upon the ground* that the 80 acres of land so owned and resided upon by said Baty must be added to the said 80 acres entered by him under the Act of May 20, 1862, in computing the quantity of land entered by said Baty under the homestead laws. (See par. 16, 17, page 4 of the record.)

The only relief prayed for is that the Secretary of the Interior shall be enjoined from rejecting appellant's application *on the ground* that the 80 acres owned and resided upon by Baty when he made his 80-acre homestead entry must be added thereto in computing the amount of land entered by him under the homestead laws, thus making Baty's homestead entry amount to 160 acres.

The defendant demurred to the bill on the ground that the court was without jurisdiction in the premises. The lower court sustained the demurrer, and the plaintiff prosecuted this appeal.

ASSIGNMENTS OF ERROR.

First. The court erred in sustaining the demurrer of the defendant to the bill.

Second. The court erred in holding that it did not have jurisdiction to consider the question raised.

Third. The court erred in not holding that the construction sought to be put upon Sections 2289 and 2306 of the Revised Statutes could only be done by altering, amending or super-adding to said statutes.

Fourth. The court erred in not granting the writ of injunction as prayed for.

ISSUES.

The issues presented in this case are as follows:

1. Has the Secretary of the Interior, under the guise of a so-called "construction" of Sections 2289 and 2306 of the Revised Statutes, so changed and altered the meaning of same as to substitute his will for that of the Congress?

2. If he has done so, is such action *ultra vires*, and has this court power to interfere to protect private rights threatened thereby?

ARGUMENT.

I.

What constitutes an entry under the homestead laws has been clearly defined by the Supreme Court of the United States, as follows:

"Under the homestead law three things are needed to be done in order to constitute an entry on public lands; first, the applicant must make an affidavit setting forth facts which entitled him to make such an entry; second, he must make formal application; and, third, he must make payment of the money required. When these three requisites are complied with, the certificate of entry is executed and delivered to him, the entry is made—the land is entered." (Hasting & Dakota Railroad Co. vs. Whitney, 132 U. S., 357.)

None of these attributes attached to the 80 acres of land lawfully procured by others from the United States, but privately acquired by Baty, and resided upon by him at the time he made his 80-acre homestead. It would seem that either the Supreme Court is in error, or else that Baty never entered but 80 acres under the homestead laws.

This question was raised in the Land Department in 1874, in the case of one Smith, and the Secretary then held (2 Copps. L. O., 18) that the privately acquired land owned and resided upon by one at the time of making an entry under the Act of May 20, 1862, could not possibly be held to be land "entered under the Homestead Laws." That ruling has remained in force for a period of nearly forty years, hundreds of cases have been adjudicated thereunder, and its correctness has never been questioned until recently. It has become a rule of property, and money has been invested and valuable rights acquired in reliance thereon. The appellant, giving full credit to this long-established ruling, bought, for a valuable consideration, in good faith, the additional right of Baty under Section 2306 of the Revised Statutes.

The law provides explicitly that Baty, if he entered less than 160 acres of land under the homestead laws, is entitled to an additional right. The records show, and it is admitted, that he only entered, and paid the fee for entering, 80 acres. But the Secretary of the Interior says that because Baty, when he made said entry, was the owner of and residing upon 80 acres of contiguous land which others had properly acquired from the United States and then sold to Baty, he (Baty) must be held to have entered 160 acres of land under the homestead laws.

Whether this *ought* to be the law, is not the question. We give the Secretary credit for sincerely believing that it should. But there is absolutely nothing in either Section

2289 or Section 2306 of the Revised Statutes which permits such a ruling. The former provided that Baty might "enter other land, lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres." In other words, Baty was authorized by the Act of 1862 to make a homestead entry, but was limited as to the area thereof. The law did not say that Baty must surrender to the United States the 80-acres already owned, and re-enter it as a part of his homestead, nor did he do so; but the statute did distinctly *limit* the quantity he could enter under said homestead laws to 80 acres. The government had already been paid for this first 80 acres, and the object of the law was not to require that it be paid for a second time, but simply provided that since Baty already owned 80 acres of contiguous land, he could only take 80 acres as a homestead; the idea being, manifestly, to keep the size of farms down to 160 acres or less, and thus build up the country more rapidly.

Section 2306, a law enacted ten years later (June 8, 1872), was limited to soldiers of the late Civil War, and provided that all of them who had theretofore entered less than 160 acres under the homestead laws, could make an additional entry. The benefits of this Act were granted irrespective of what amount of land the soldier may have acquired otherwise than under the homestead laws, and regardless of whether or not he owned other lands when he made his homestead entry. And since Congress saw fit to make no such limitation, the Secretary of the Interior can not do so. (Webster vs. Luther, 163 U. S., 331-339-340.)

The Act of May 20, 1862, also limited the entry of a man taking land priced at \$2.50 per acre, to 80 acres. It would be just as reasonable as was the Secretary's ruling

herein, to hold that an entry of 80 acres of such land was an entry of 160 acres under the homestead laws, because the man could have entered 160 acres of land which was for sale at \$1.25 per acre.

Had the Congress ever intended to enact the legislation the Secretary seeks to derive from these Sections 2289 and 2306, it would have been a simple matter to have added a provision to either section to that effect. The very fact that it failed to do so is conclusive evidence that it did not so intend. Therefore, the present ruling of the Secretary is clearly an attempt to substitute his will for that of the Congress.

II.

That the mere fact that the decision of the Secretary of the Interior is erroneous would not give the court the right to interfere, is elementary. If the language of the law permits of the so-called "construction" which the Secretary has placed upon it, then, no matter if such construction is erroneous, the courts are powerless to grant relief. But if, on the other hand, the Secretary has overridden the expressed will of Congress, and has reached his decision by either altering, amending or super-adding to the law, the court must, when called upon, extend the strong arm of its authority and prevent threatened abuses.

The language of the Supreme Court in the case of *Garfield vs. Goldsby*, 211 U. S., 249-261, is to the point, and expresses, in a few words, and better, we believe, than can be found elsewhere, under what circumstances the courts will interfere with the head of an executive department. The court said:

"We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that

could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice Bradley in the Board of Liquidation vs. McComb, 92 U. S., 531, 541: 'But it has been well settled that when a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury by such refusal, may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other.' "

To the same effect are Decatur vs. Paulding, 14 Pet., 497; U. S. vs. Seaman, 17 How., 225; Gaines vs. Thompson, 7 Wall., 347; Morrill vs. James, 106 U. S., 467; Noble vs. Union River Logging Co., 147 U. S., 165; Magnetic Healing Co. vs. McAnnulty, 187 U. S., 94; Ballinger vs. Frost, 216 U. S., 240.

The record here clearly shows that, under any view of the facts that can be taken, the action of the Secretary, in holding that Baty entered 160 acres of land under the homestead laws, was *ultra vires* and beyond the scope of his authority; that he has no power whatever to hold that Baty entered 160 acres of land under the homestead laws; and that his rejection of appellant's application, solely on this ground, will cause him serious damage and injury, and that appellant is wholly without remedy at law.

This is in no sense an appeal to the courts from an adverse decision of the Secretary of the Interior; it is simply

an effort to prevent the Secretary of the Interior from *substituting his will* for that of the Congress. If there is any lawful reason for rejecting appellant's application, we do not object. We only ask that the Secretary be enjoined from so changing and adding to the law as to make it mean what he thinks it *ought* to mean, instead of carrying out the plain mandate appearing on its face.

The contention that public land matters are wholly and exclusively committed to the jurisdiction of the Interior Department, is only true so long as said Department carries out the will of the Congress as expressed in its statutes.

The determination of the quantity of land entered by Baty under the homestead laws, which was the sole question before the Secretary so far as this proceeding goes, is a matter of such simple computation that it cannot be justly claimed that it involves the exercise of either judgment or discretion. The claim that it does, can only have been put forward to avoid having to defend an unjust and indefensible ruling. The fact that the Secretary is not attempting to justify his ruling, but is defending this suit solely on the ground of jurisdiction, is significant.

Therefore, since it is shown that the law does not permit of the construction placed upon it in the ruling complained of, and that appellant is threatened with the deprivation of a property right through the attempt of the Secretary of the Interior to alter, amend or super-add to the law, it follows that this court *has* jurisdiction, and that the decision of the lower court should be reversed and the Secretary enjoined as prayed.

F. W. McREYNOLDS,
D. N. CLARK,
Attorneys for Appellant.



COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

APR - 8 - 1913

Henry W. Hodges
clerk.

No. 2523.

**In the Court of Appeals of the District of
Columbia.**

JANUARY TERM, 1913.

FRANK X. O'BRIEN, APPELLANT,

v.

WALTER L. FISHER, SECRETARY OF THE INTERIOR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

CHARLES W. COBB,
Assistant Attorney General,
F. W. CLEMENTS,
First Assistant Attorney,
C. EDWARD WRIGHT,
Assistant Attorney
For the Appellee.



In the Court of Appeals of the District of Columbia.

JANUARY TERM, 1913.

FRANK X. O'BRIEN, APPELLANT,	} No. 2523.
v.	
WALTER L. FISHER, SECRETARY OF THE Interior.	

*APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.*

BRIEF FOR APPELLEE.

This is an appeal from the decree of the Supreme Court of the District of Columbia, dismissing appellant's bill, demurrer to which was sustained by the chancellor sitting in the cause.

THE CASE.

One William H. Baty, in 1868, made an original homestead entry of public land of the United States, comprising 80 acres, situate within the Ironton, Mo., land district. (Record, p. 2.) This entry was made under the portion of the act of May 20, 1862 (R. S., sec. 2289), which reads as follows:

And every person owning and residing on land may, under the provisions of this section,

enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied exceed in the aggregate one hundred and sixty acres.

The nature of the entry is averred in paragraph 4 $\frac{1}{2}$ of the bill. (Record, p. 2.) It is what is known in public land law nomenclature as an "adjoining farm entry." While under the first part of this section (R. S., sec. 2289) a person duly qualified may enter 160 acres, he must physically, actually, reside thereon, and must cultivate the land for the period required by law; but under the portion of Revised Statutes, section 2289, above quoted, he was enabled to enter public land of the United States, provided it was contiguous to land he already owned, in such amount as would make up, with the land so owned and occupied by him, 160 acres, without actually moving thereto. That is, while not relieved of the requirements of law as to residence and cultivation, he is not required to remove from the land which he originally owned in order to reside upon and cultivate that which he acquires under the homestead law, because the whole 160 acres are considered as constituting one farm or body of land, and residence upon and cultivation of a portion are equivalent to residence and cultivation as to the whole.

Baty owned land (80 acres) which he had acquired from some party other than the United States, but which had originally been public land of the United States. (Record, p. 3.) With the 80 acres entered under the section of law already quoted, Baty became

possessed of a homestead of 160 acres—a quarter section.

Baty, it is averred (Record, p. 3), was a soldier qualified, other elements of title being present, to make a soldier's additional homestead entry under section 2306, Revised Statutes.

This suit arises from the attempt of appellant, Frank X. O'Brien, to enter 80 acres of public land in the Phoenix, Ariz., land district, under Baty's soldier's additional right, which O'Brien claims to have purchased (Record, p. 4), a soldier's additional right being assignable.

O'Brien's application thus to enter came in due and regular course to the appellee for ultimate decision. After due consideration of the facts narrated and of the law applicable thereto, the Secretary of the Interior, in the exercise of his discretion and judgment and of the jurisdiction conferred upon him by law, held said entry for rejection. It is said in the bill (p. 4) that, in deciding the case, the defendant held that Baty made homestead entry for 160 acres instead of 80 acres as shown by the records. The averment is the pleader's conclusion—or distortion. No one can hold that 80 is 160 in the form alleged by appellant. The O'Brien case is on all fours with that of *Timothy Mahoney* (41 L. D., 129), decided June 7, 1912. The decision in the O'Brien case was rendered November 7, 1912. (Record, p. 4.)

The prayers for injunction are that the defendant be enjoined from "refusing to recognize and give force and effect to the records of the Interior Depart-

ment" (although the bill, as a whole, shows that the Secretary has consistently recognized and given force and effect to these records), and that the defendant be enjoined from rejecting the plaintiff's application to enter, on either of two grounds stated in paragraphs 3 and 4, page 2, of the record.

To this bill, appellee demurred on the ground that the proceeding is manifestly an attempted invasion of his jurisdiction—an effort to secure in the court a review of a case exclusively within his jurisdiction. The demurrer was sustained and the bill was dismissed.

ARGUMENT.

An argument is scarcely necessary. It is apparent from the simple statement of the case that in principle it is wholly like and is entirely controlled by frequent decisions of this court: *Fisher v. United States ex rel. Grand Rapids Timber Company* (37 App. D. C., 436); *United States ex rel. McKenzie v. Fisher* (39 App. D. C., 7); *United States ex rel. Champion Lumber Company v. Fisher* (40 Wash. L. R., 780); *United States ex rel. Charles B. McManus v. Fisher* (40 Wash. L. R., 778); *United States ex rel. Red River Lumber Co. v. Fisher* (40 Wash. L. R., 782); *Wade et al. v. Fisher* (40 Wash. L. R., 779); *United States ex rel. Southwick v. Fisher* (41 Wash. L. R., 114); and *McKenzie v. Fisher* (decided Feb. 25, 1913, not yet reported). To the same effect is *United States ex rel. Ness v. Secretary of the Interior* (223 U. S., 683).

Baty's ownership of his original 80 acres did not disqualify him as an entryman. He had a right, in

1868, when he made the entry described in paragraph 4 of the bill (Rec., p. 2) to leave his farm and to enter any available public land open to homestead entry to the full extent of 160 acres. If he had, he would have completely exhausted his homestead right and there would have been naught left on which to predicate a soldier's additional right under section 2306, Revised Statutes. Or he might have entered 40, 60, 80, or 120 acres—exercising his homestead privilege, but exhausting the right, in view of his military record, only *pro tanto*. In any aspect, he would have been obliged to remove to, reside upon, and to cultivate the entered land.

Baty, in 1868, had two privileges—that of entering 160 acres elsewhere, subject to the conditions just described, or he might enter adjoining public land—only, in the latter contingency, he must necessarily take less than 160 acres; only so much as, with his original holding, would make up the entire 160 acres. The advantage to him would be freedom from removing to and residing literally upon the newly entered land. He could enter 160 acres elsewhere, by removal; or, without removal, he could enter contiguous public land in an amount to make up 160 acres. But, whichever course he elected to take, provided he thereby acquired title to the full amount of land allowed by law—160 acres—he exhausted not only the exercise of his homestead privilege, but his homestead right in its entirety. In other words, the United States owed him nothing—nothing on which he could base a soldier's additional right; nothing

which, pretending it was a soldier's additional right, he could assign to another.

O'Brien therefore bought nothing, because Baty had nothing to sell.

This was the department's position when O'Brien's application came before the Secretary. O'Brien thinks that the Secretary is wrong in his application of the law to his case. He points to former decisions of other Secretaries which he maintains hold the other way. So he seeks to transfer the issue to the court.

Well, assume that the Secretary's view is not as sound as that entertained by the appellant; the case becomes strongly suggestive of *United States ex rel. Ness v. Fisher, supra*. The Secretary's decision rejecting appellant's application was not arbitrary or capricious, but was based upon at least a possible construction of the law (223 U. S., at p. 691), and it necessarily involved the exercise of judgment and discretion. "So," as the court said in the *Ness* case (p. 691),

at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative.

This is the instant case in a nutshell, and this court has also very "uniformly answered" the question propounded in the same manner.

On page 4 of his brief, appellant says:

Whether this *ought* to be the law is not the question. We give the Secretary credit for sincerely believing that it should. But there is absolutely nothing in either section 2289 or section 2306 of the Revised Statutes which permits such a ruling.

This is his case: There is nothing in the sections on which he relies to justify the decision of the Secretary in his case. Who is to decide this—appellant or the Secretary? Apparently, the Secretary did find something in these sections to permit the conclusion reached when appellant's case was before him. Appellant credits the Secretary with sincerity—and incidentally dismisses any imputation of caprice or arbitrariness. He is merely guilty of error, from appellant's point of view; wherefore the consideration of this court is invoked to the end that the Secretary's decision may be reviewed and the error corrected, precisely as if the law permitted an appeal.

Appellant's conviction that there is nothing in these sections permitting the ruling of which he complains apparently proceeds from his statement that for 40 years other Secretaries have entertained his view of the law, whereby it has become "a rule of property." (Brief, p. 4.) If by this he means that a Secretary may construe a law and that his con-

struction marks unalterably the sense in which thereafter the law is to be taken and administered, no matter how erroneous such a construction may later be deemed to be, we respectfully submit that the proposition is untenable. We are not concerned here with a rule, a custom, established by the decision of some court, by which property devolves; we are dealing directly, fundamentally, with a *right* to property, a right to take public land from the United States. The Secretary has the same right to reverse himself that a court possesses; the same right to overrule a former decision that a court exercises. The departmental decision is never a personal decision. It is made by the Secretary as Secretary and not by the individual who happens at the time to fill that office. (*Beley v. Naphtaly*, 169 U. S., 353, 364.) The Secretary may always reverse a former ruling, provided vested rights are not destroyed. There is, there can be, no pretense here that appellant has acquired, by the matters recited in his petition, a vested property right in any part of the public domain whereunto the Secretary owes him the discharge of a mere ministerial duty. In this aspect, the case of *Garfield v. United States ex rel. Goldsby* (211 U. S., 249), cited on page 6 of appellant's brief, has no relevancy to the case at bar. The disposition made of that case by the Supreme Court in *United States ex rel. Knight v. Lane*, decided March 17, 1913, is appropriate here. And, quite curiously, it may be noted at this point that not a few of the authorities on which appellant relies, page 7 of his brief, are the

cases cited by the Supreme Court in its decision in the case of *Ness*, supra, and in support of the doctrine therein announced and applied.

FINALLY.

If the appellant's case before the Secretary has been finally decided and his application has been finally rejected—this being the situation at the time appellant instituted this suit—then, we submit, it is rather late to enjoin the Secretary. He has acted. The case is moot.

But, in paragraph 15 of his bill (Rec., p. 4), he says that this is not so. He says he instituted his proceeding to acquire the land, before the local land officers, that it "was thereafter continuously pending before the Department of the Interior," and that it "is still pending before said department at this time and has not been finally rejected." In this aspect the suit is premature. What the Supreme Court said recently in the case of *United States ex rel. Herman Knight v. Lane* (decided Mar. 17, 1913) is quite apposite.

* * * In such a case we perceive no reason for departing from the rule applicable to kindred proceedings in the Land Department, which is well stated in the following excerpts from the opinion in *Brown v. Hitchcock* (173 U. S., 473, 476-478):

"Until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the Land Department. In *United States v. Schurz* (102 U. S., 378, 396), which was an

application for a mandamus to compel the delivery of a patent, it was said: 'Congress has also enacted a system of laws by which rights to these lands may be acquired and the title of the Government conveyed to the citizen. This court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.'

* * * * *

"We do not mean to say that cases may not arise in which a party is justified in coming into the courts of the District to assert his rights as against a proceeding in the Land Department or when the department refuses to act at all. *United States v. Schurz, supra*, and *Noble v. Union River Logging Railroad Co.* (147 U. S., 165) are illustrative of these exceptional cases.

"Neither do we affirm that the administrative right of the departments in reference to proceedings before them justifies action without notice to parties interested, any more than the power of a court to determine legal and equitable rights permits action without notice to parties interested.

* * * * *

"But what we do affirm and reiterate is that power is vested in the departments to determine all questions of equitable right or

tilte, upon proper notice to the parties interested, and that the courts must, as a general rule, be resorted to only when the legal title has passed from the Government."

As entirely apposite, we repeat the statement in *New Orleans v. Paine* (147 U. S., 261, 266): "Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon the final hearing."

The court is thus presented with a dilemma: It is either too late by injunctive process to interfere with the Secretary's action, even if the court had jurisdiction to interfere, or, the proceedings before the Secretary being still *in fieri*, the suit is premature.

The judgment below should be affirmed.

Respectfully submitted.

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